

RESOLUTION NO. 2004-151

A RESOLUTION OF THE LODI CITY COUNCIL
APPOINTING D. STEPHEN SCHWABAUER TO THE
POSITION OF CITY ATTORNEY, AND APPROVING THE
EMPLOYMENT CONTRACT

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NOW, THEREFORE, BE IT RESOLVED that the Lodi City Council hereby appoints D. Stephen Schwabauer to the position of City Attorney for the City of Lodi; and

BE IT FURTHER RESOLVED that the City Council hereby approves the employment contract attached hereto as Exhibit A; and

BE IT FURTHER RESOLVED that the City Council hereby approves
1) increasing the City Attorney's deferred compensation City match from 2% to 3% and
2) setting the annual salary for the position of City Attorney at \$125,000, to be effective the first pay period in July.

Dated: July 21, 2004

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I hereby certify that Resolution No. 2004-151 was passed and adopted by the City Council of the City of Lodi in a regular meeting held July 21, 2004, by the following vote:

AYES: COUNCIL MEMBERS – Beckman, Hitchcock, Land, and
Mayor Hansen

NOES: COUNCIL MEMBERS – None

ABSENT: COUNCIL MEMBERS – Howard

ABSTAIN: COUNCIL MEMBERS – None



SUSAN J. BLACKSTON
City Clerk

CITY ATTORNEY EMPLOYMENT AGREEMENT

This Agreement is made and entered into as of July 21, 2004, by and between the City of Lodi, a municipal corporation, hereinafter called "City" and D. Stephen Schwabauer, hereinafter called "Employee," both of whom agree as follows:

RECITALS:

It is the desire of the City to retain the services of Employee and to provide inducement for him to remain in such employment, make possible full work productivity by assuring Employee's morale and peace of mind with respect to future security, and to provide a just means for terminating Employee's services.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties hereto agree as follows:

1. GENERAL:

City hereby agrees to employ Employee as the City Attorney of City and Employee agrees to perform the functions and duties the City Council shall from time to time assign to him.

2. DUTIES & AUTHORITY:

Employee has the duty to:

- (a) Perform the functions and duties of a City Attorney as specified in the California Government Code, Rules of Professional Conduct for Attorneys, City Ordinances, Resolutions, Rules and Regulations and other state and local statutes,
- (b) Act as chief legal advisor to City,
- (c) Perform all legally permissible and proper duties and functions as the City Council shall assign. Such duties may be modified from time to time upon such terms as are mutually agreeable to City and Employee, and
- (d) Employee in coordination with the City Manager shall recommend policies and rules and regulations to implement City Council policies and shall enforce policies established by the City Council. To accomplish this, Employee shall have the power to and shall be required to:

- (1) Attend City Council meetings as needed by the City Council.

- (2) Review all documents agendized for any special and/or regular meetings of the City Council. Employee may make recommendations to the City Manger and the Council concerning any agenda items.

3. EXCLUSIVE EMPLOYMENT:

- (a) Employee has the duty and herein commits to devote his full time and energies in the best interest of the City, and to act in accordance with the duties and responsibilities of the position of City Attorney.
- (b) Employee shall not accept employment as an attorney of law from or on behalf of any person, firm, corporation or entity during the term of this Agreement. The foregoing shall not be construed to prevent Employee from performing volunteer community service, or pro bono services, provided Employee shall, prior to performing such services, disclose such anticipated services to the City Council and obtain its approval. Such outside services shall not create nor tend to create a disqualifying conflict of interest as defined by the California Political Reform Act of 1974, as amended, nor shall such services impair Employee's ability to fully perform his duties for City hereunder.

4. EMPLOYEE COMMITMENTS:

- (a) Specific Tasks and Work Plans – Employee agrees to accomplish specific tasks as specified and described by the City Council from time to time in a timely and professional manner. Such specific tasks shall be discussed with Employee and then adopted by motion by the City Council as frequently as the City Council may choose.
- (b) Hours of Work – Employee is an exempt employee who does not accrue compensatory time off, but is expected to engage in those hours of work which are necessary to fulfill the obligations of his position. Employee does not have set hours of work as he is expected to be available at all times. It is recognized that Employee must devote a great deal of his time outside “normal office hours” to the business of the City, and to that end Employee's schedule of work each day and week shall vary in accordance with the work required to be performed. The Employee has discretion as to his work schedule.

5. CITY COMMITMENTS:

- (a) City shall provide Employee with an office, support staff, office equipment, supplies and all other facilities and services adequate for the performance of his duties.
- (b) City shall pay for, or provide, Employee reimbursement of actual business expenses. The City shall provide Employee with a City credit card to charge

appropriate and lawful business expenses up to the amount provided for in the City budget.

- (c) City agrees to pay for Employee's California State Bar, National Institute of Municipal Law Officers dues and subscriptions, and Minimum Continuing Legal Education expenses (MCLE).
- (d) City agrees to pay the professional dues and subscriptions on behalf of Employee which are necessary for Employee's continuation and full participation in national, regional, state, or local associations and organizations necessary and desirable for the good of the City, and for Employee's continued professional participation and advancement up to an amount provided for in the City budget.
- (e) City agrees to pay travel and subsistence expenses of Employee to pursue official and other functions for the City, and meetings and occasions to continue the professional development of Employee, including but not limited to Annual Conferences of the League of California Cities and the League's City Attorney's Division, the Annual Conference of the National Institute of Municipal Law Officers, and other national, regional, state, and local conferences, and governmental groups and committees upon which Employee serves as a member up to an amount provided for in the City budget.
- (f) City recognizes the desirability of representation in and before local civic and other organizations, and Employee is authorized to become a member of civic clubs or organizations, for which the City shall pay membership dues up to an amount provided for in the City budget.

6. MUTUAL COMMITMENTS:

Performance Evaluation – Annual performance evaluations are an important way for the City Council and Employee to ensure effective communications about expectations and performance. The City Council recognizes that for Employee to respond to their needs and to grow in the performance of his job, he needs to know how the City Council Members think he is performing. To assure Employee gets this feedback, the City Council commits to:

- (a) Conduct an evaluation of Employee's performance at least annually, or on any other schedule deemed appropriate by the City Council. The City Council may use an outside facilitator to assist them in conducting this evaluation.
- (b) The annual review and evaluation shall be in accordance with specific criteria developed jointly by the City Council and Employee. Such criteria may be added to or deleted as the City Council may from time to time determine in consultation with Employee.
- (c) The City Council and Employee shall define such goals and performance objectives which they determine necessary for the proper operation of the City for

the attainment of the City Council's policy objectives. The City Council and Employee shall further establish a relative priority among those various goals and objectives.

7. COMPENSATION:

City agrees to provide the following compensation to Employee during the term of the Agreement:

- (a) Base Salary – Employee shall be paid an annual salary of \$125,000 per year (retroactive to June 21, 2004), which sum may be adjusted from time to time as provided in this Agreement by action of the City Council, payable in twenty-six (26) equal installments in the same manner as City department heads.
- (b) The City shall pay all traditional employer costs required by law, including but not limited to: FICA, Medicare, Unemployment Compensation, and workers compensation.
- (c) Future annual adjustments to Employee's salary shall be set by City Council action. City may not reduce salary or benefits provided by this Agreement unless:
 - (i) it does so on a Citywide (all Management employees) basis; or,
 - (ii) it does so after providing Employee with a written performance evaluation process that provides direction and opportunity for improvement prior to any action to reduce salary or benefits.

8. AUTOMOBILE:

Employee shall not be provided an automobile or automobile allowance. Employee shall be reimbursed for travel expenses in accordance with City's travel policies.

9. GENERAL EXPENSES:

Employee shall be permitted to attend conferences, seminars and/or other such meetings, the reasonable costs of which shall be paid by City. Employee shall also be reimbursed by City for reasonable out of pocket expenses incurred in the course and scope of his employment.

10. BASIC BENEFITS:

- (a) Holidays - Employee shall receive thirteen and one half (13 ½) paid holidays per year credited in the same manner as all other City employees.
- (b) Vacation Leave - Employee shall be granted paid vacation leave in the amount of 15 days per year at the same rate of accumulation granted all other City

employees. Upon termination or resignation of employment, Employee or those entitled to his estate, shall receive a lump sum payment for unused or accumulated vacation time to his credit at his rate of pay as of his date of termination.

- (c) Sick Leave - Employee shall be granted 12 days of sick leave per year which will accrue at a rate of 3.08 hours per pay period. Employee's sick leave shall be convertible as provided in the City of Lodi Executive Management Statement of Benefits, March 18, 1998.
- (d) Administrative Leave - Employee shall be granted eighty (80) hours of administrative leave per year. Upon termination or resignation of employment, Employee or those entitled to his estate, shall receive a lump sum payment for unused or accumulated administrative leave to his credit at his rate of pay as of his date of termination.
- (e) Other terms and conditions - Except as otherwise provided herein, all provisions of the City of Lodi Municipal Code, official policies and regulations and rules of the City relating to vacation, holidays, retirement systems contributions, and other fringe benefits and working conditions as they now exist or hereafter may be amended also shall apply to Employee as they would to other management employees of City in addition to said benefits set out in this Agreement.

11. INSURANCE:

- (a) Medical Insurance: Employee shall receive family medical and pharmaceutical insurance, family dental insurance, long term disability, chiropractic insurance and any other similar benefit which may be made available to Employee by the City as outlined in the City of Lodi Executive Management Statement of Benefits, March 1998 or by Council Resolution. The Statement of Benefits or Council Resolution describes these benefits and any applicable deductibles.
- (b) Deferred Compensation: Employee may participate in the City's Deferred Compensation plan. The City will match up to 3% percent of the employee's base salary.
- (c) Life Insurance: Employee shall receive Life Insurance equivalent to City Department Heads.

12. RETIREMENT:

City is a full member of the Public Employees Retirement System (PERS) to which City agrees to contribute to Employee's retirement account the total amount required by it and to contribute Employee's contribution of seven (7) percent to the membership contract with PERS for each pay period.

13. SEPARATION:

- (a) Resignation – In the event Employee terminates this agreement by voluntary resignation of his position with the City, Employee shall not be entitled to severance pay otherwise provided in Section 14 of this contract. In the event Employee voluntarily resigns his position with City, he shall give City at least thirty (30) days advance written notice and shall be entitled to all earned salary and in-lieu vacation leave.
- (b) Termination & Removal – The City Council may remove Employee at any time, with or without cause, by a majority vote of its members. Notice of termination shall be provided to Employee in writing. Any such notice of termination shall be given at a noticed meeting of the City Council. Employee shall not be removed during the first 120 days following any change in membership of the City Council, except upon four-fifths vote of the City Council. Given the at-will nature of the position of City Attorney, an important element of the employment Agreement pertains to termination. It is in both the City's interest and that of Employee that separation of Employee be done in a businesslike manner.

14. SEVERANCE PAY:

In the event Employee is terminated by the City Council within the first six (6) months of his employment under this Agreement and Employee remains willing and able to perform the functions and duties of City Attorney, City agrees to pay to Employee a lump sum cash payment equal to three (3) months salary. In the event Employee is terminated by the City council after the first twelve (12) months of his employment under this Agreement and Employee remains willing and able to perform the functions and duties of City Attorney, City agrees to pay to Employee a lump sum cash payment equal to six (6) months salary. In all cases such payments shall be subject to all rules and regulations governing withholding. However, notwithstanding the above, if Employee is terminated due to retirement, insubordination, incapacity, dereliction of duty, conviction of a crime involving acts of moral turpitude or involving personal gain to him, or a breach of this agreement, City shall have no obligation to pay any severance provided in this section.

15. EMPLOYMENT TERM:

- (a) Employee is an "at will" employee and shall serve at the pleasure of the City Council.
- (b) Except as provided in Section 14, nothing in this Agreement shall prevent, limit or otherwise interfere with the rights of the City Council to terminate the services of Employee.

- (c) Nothing in this Agreement shall prevent, limit or otherwise interfere with the right of employee to resign at any time from his position as City Attorney, subject only to the provisions set forth in Section 13 of this Agreement.

16. MISCELLANEOUS PROVISIONS:

Except as provided otherwise in this agreement, all provisions of the City of Lodi Municipal Code, official policies and regulations and rules of City relating to disability, incapacity, vacation, retirement systems contributions, holidays and other fringe benefits and working conditions as they now exist or hereafter may be amended also shall apply to Employee as they would to other Department Heads of City in addition to said benefits set out in this contract.

17. MODIFICATIONS:

No modification of this agreement shall be valid unless said modification is in writing and signed by the party to be charged.

18. CONFLICT OF INTEREST:

Because of the duties and role of Employee on behalf of the City and its citizenry, Employee shall not, during the term of this Agreement, individually, as a partner, joint venturer, officer or shareholder, invest or participate in any business venture conducting business in the corporate limits of City, except for stock ownership in any company whose capital stock is publicly held and regularly traded, without the prior approval of the City Council.

Employee shall also be subject to the conflict of interest provisions of the California Government Code and any conflict of interest code applicable to his City employment. Employee is responsible for submitting to the City Clerk the Appropriate Conflict of Interest Statements at the time of appointment, annually thereafter, and at the time of separation from the position.

19. INDEMNIFICATION:

In accordance with and subject to California's Tort Claims Act (Government Code §825 et seq.), City shall defend and indemnify Employee against and for all losses sustained by Employee in direct consequences of the discharge of his duties on the City's behalf for the period of his employment. City shall defend, save harmless and indemnify Employee against any tort, professional liability claim or demand or other legal action, whether groundless or otherwise, arising out of an alleged act of omission occurring in the performance of his duties as City Attorney. City may compromise and settle any such claim or suit and pay the amount of any settlement or judgment rendered thereon. Whenever Employee shall be sued for damages arising out of the Performance of his duties, the City may provide defense counsel for Employee in such suit and indemnify him from any judgment rendered against

him; provided that such indemnity shall not extend to any judgment for damages arising out of any willful wrongdoing. Said indemnification shall extend beyond termination of employment and the otherwise expiration of this Agreement to provide protection for any such acts undertaken or committed in his capacity as City Attorney, regardless of whether the notice of filing of a lawsuit occurs during or following employment with the City.

20. ATTORNEY'S FEES:

If either of the parties hereto brings any action or proceeding against the other, including but not limited to, an action to enforce or to declare the termination, cancellation or revision of the Agreement, the prevailing party in such action or proceedings shall be entitled to receive from the other party all reasonable attorney's fees and costs, incurred in connection therewith. In the event either party shall initiate any suit, action, or appeal on any matter related to this Agreement, then the court before whom such suit, action, or appeal is taken shall award to the prevailing party such attorney's fees as the court shall deem reasonable, and such award and all allowable costs of the event may be either added to or deducted from the balance due under this Agreement or be a separate obligation as appropriate.

21. SEVERABILITY:

If any provision, or any portion of any provision of this contract is held to be unconstitutional, invalid, or unenforceable, the remainder of this agreement, or portion hereof, shall be deemed severable and shall not be affected, but shall remain in full force and effect.

22. INTEGRATED AGREEMENT:

This writing contains the entire agreement between the parties and all prior or contemporaneous agreements, understandings or discussions relative to this agreement are hereby superseded.

23. JURISDICTION AND VENUE:

This Agreement shall be construed in accordance with the laws of the State of California and the parties hereto agree that venue shall be in Lodi, California.

24. NOTICES:

All written notices required pursuant to this agreement shall be delivered to: City Clerk, City Hall, P.O. Box 3006, 221 West Pine Street, Lodi, CA 95241; and D. Stephen Schwabauer, 141 S. Rose Street, Lodi, CA 95240.

25. EXECUTION:

IN WITNESS WHEREOF, the City Council of the City of Lodi has caused this Agreement to be signed and executed on its behalf by the Mayor and Employee has signed and executed this Agreement as of the day and year first above written.

CITY OF LODI, a municipal corporation:

EMPLOYEE:

By: Larry D. Hansen
Larry D. Hansen
Mayor

D. Stephen Schwabauer
D. Stephen Schwabauer
City Attorney

Attest:

Approved as to Form:

Susan J. Blackston
Susan J. Blackston
City Clerk

Jeffrey A. Mitchell
Jeffrey A. Mitchell
Kronick, Moskovitz, Tiedemann &
Girard